Hearing:
May 3, 2000

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Paper No. 30
CEW

11/16/00

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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Bose Corporation
v.
QSC Audio Products, Inc.

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Opposition No. 109,664
to Application No. 75/143,984
filed on August 2, 1996

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Charles Hieken and Cynthia E. Johnson of Fish & Richardson for opposer.

Alice D. Leiner and Barry J. Reingold of Perkins Coie for applicant.

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Before Hanak, Quinn and Walters, Administrative Trademark Judges.

Opinion by Walters, Administrative Trademark Judge:

Bose Corporation filed its opposition to the application of QSC Audio Products, Inc. to register the mark POWERWAVE for "electronic audio and video signal

processing equipment, namely, amplifiers and power amplifiers," in International Class 9.[1]

As grounds for opposition, opposer asserts that applicant's mark, when applied to applicant's goods, so resembles opposer's previously used and registered marks WAVE and ACOUSTIC WAVE for various goods, as indicated below, as to be likely to cause confusion, under Section 2(d) of the Trademark Act.

WAVE

for "radios, clock radios, audio tape recorders and players, portable radio and cassette recorder combinations, compact stereo systems and portable compact disc players."[2]

The mark, ACOUSTIC WAVE, for "loudspeaker systems and music systems consisting of a loudspeaker system and amplifier and at least one of a radio

[1] Application Serial No. 75/143,984, filed August 2, 1996, based upon use of the mark in commerce, alleging dates of first use and first use in commerce as of November 11, 1994.

[2] Registration No. 1,633,789, issued February 5, 1991, in International Class 9. Sections 8 and 15 affidavits accepted and acknowledged, respectively.

tuner, compact disc player and audio tape cassette player"[3]; and for "loudspeaker systems."[4] Applicant, in its answer, denies the salient allegations of the claim and asserts affirmatively that "wave" is a generic term in the audio industry[5]; that there is no likelihood of confusion because the parties' respective goods are sold to different purchasers through different channels of trade, that purchasers of applicant's goods are sophisticated users of audio equipment, that the goods differ in price and application, and that applicant's mark is used in connection with the technology used on the goods and not as the name of the goods.

The Record

The record consists of the pleadings; the file of the involved application; certified status and title copies of opposer's pleaded registrations, made of record by opposer's notice of reliance; excerpts from various directories and phone books, made of record by applicant's

[3] Registration No. 1,764,183, issued April 13, 1993, in International Class 9. Sections 8 and 15 affidavits accepted and acknowledged, respectively.

[4] Registration No. 1,338,571, issued May 28, 1985, in International Class 9. Section 8 affidavit accepted.

[5] The Board, in its order of June 16, 1999, denied applicant's motion to amend its answer to assert a counterclaim to cancel two of opposer's three pleaded registrations. In view thereof, we have considered applicant's affirmative statement that "wave" is generic as merely addressing the issue of the strength of opposer's marks, rather than as a collateral attack on any of opposer's pleaded registrations. The Board also noted and entered the parties' stipulated protective order.

notice of reliance; the testimony deposition by opposer of Stephen Kingbury, opposer's direct marketing general manager, with accompanying exhibits; and the testimony depositions by applicant of Peter Kalmen, applicant's director of sales and marketing; Kenneth D. Jacob, opposer's professional systems general manager; and Timothy Dorwart, opposer's director of sales and marketing for professional products, all with accompanying exhibits. Both parties filed briefs on the case[6] and an oral hearing was held.

As a preliminary matter, we note opposer's objection to Kalmen Testimony Exhibits 52 and 53, which are TrademarkScan trademark search reports. The testimony of Mr. Kalmen adequately establishes the foundation for the admissibility of this evidence.[7] However, having said this, these trademark search reports by a private third party are of little, if any, persuasive value in this case. Exhibit 52 consists solely of a list of alleged registered marks from which we can draw no conclusions. Exhibit 53 consists

[6] Applicant originally filed its entire brief under seal. However, following opposer's objection and a discussion at the oral hearing, applicant filed a redacted copy of its brief.

[7] Opposer's contention that this is inadmissable because it was not produced during discovery is not well taken. Opposer has not pointed to any specific discovery request to which applicant did not respond. Further, Mr. Kalmen testified that the search was done "recently" in relation to his testimony and, thus, it is likely that it was produced within a reasonable period of time thereafter.

of information regarding alleged pending trademark applications and existing registrations. It is well established that third-party registrations may not be made of record merely be submission of information from a third-party database. *See Weyerhaeuser Co. v. Katz*, 24 USPQ2d 1230 (TTAB 1992); and *Trademark Trial and Appeal Board Manual of Procedure (TMBP)*, Section 703.02(b). The existence of third-party applications, even if properly established, which they are not, is of little evidentiary value.

Opposer "notes" that applicant failed to state the purpose for which its materials were submitted under Notice of Reliance. However, opposer has not objected to this evidence and we consider the evidence to be properly of record. We address the persuasiveness of this evidence in our analysis.

The Parties

Opposer[8] is a manufacturer of electronic audio products that it sells directly to relevant consumers in the home

[8] Opposer's founder, Dr. Amar Bose, conducts research at the Massachussets Institute of Technology in physical acoustics and psychoacoustics, and holds patents in the field of acoustics. (Opposer's Exhibit 3D.) In being awarded the Inventor of the Year Award in 1987 by Intellectual Property Owners, Inc., Dr. Bose's accomplishments are described, in part, as follows (Opposer's Exhibit 5):

> Amar G. Bose and William R. Short were granted a patent in 1986 for a loudspeaker system that employs a vibrating cone

audio market and through its dealers in the professional audio market. Opposer's products are sold under the mark BOSE along with a product or series mark. In the consumer audio market, opposer uses, among other marks, the mark ACOUSTIC WAVE on the "Acoustic Wave Music System" ("AWMS"), a compact home audio system, and the mark WAVE on the "Wave" radio, which may or may not also contain a CD player.[9] Mr. Dalwart testified that opposer manufactures and sells power amplifiers only to the professional market; and that neither the WAVE mark nor the ACOUSTIC WAVE mark is used in connection with these products.

Opposer's witness, Mr. Kingsbury, describes the "Acoustic Wave Music System" ("AWMS") as "an electronic audio product that includes a power amplifier." The evidence establishes that the ACOUSTIC WAVE mark has been in use on the AWMS compact home audio system since 1984; that the AWMS sells for approximately $1000; that the AWMS

> located inside an acoustic wave guide. The basis of the new technology is a concept involving controlled interaction of acoustical waves with moving surfaces … .

[9] Opposer introduced evidence regarding its use, in the professional audio market, of the mark ACOUSTIC WAVE CANNON on a bass speaker. ACOUSTIC WAVE CANNON is a distinctly different mark than either WAVE or ACOUSTIC WAVE. Opposer did not plead the use of the mark ACOUSTIC WAVE CANNON in its notice of opposition, nor does the record indicate that the issue of likelihood of confusion with respect to this mark has been tried by the express or implicit consent of the parties. Thus, we have considered this evidence for the limited purpose of establishing that opposer does sell products in the professional audio market, but not that it uses either of the marks in the pleaded registrations in this market.

is “based on wave technology”; and that the AWMS may be used also as a portable public address system. (Opposer’s Exhibit 4C.) One article (Opposer’s Exhibit 3B) states that “the [AWMS] design and technology is based on a new concept involving controlled interaction of acoustical waves with moving surfaces.” Mr. Kingsbury testified that opposer’s annual sales of its AWMS total more than $50 million; and that its AWMS annual advertising expenses total more than $5 million. The ACOUSTIC WAVE mark appears on the product and its packaging along with opposer’s BOSE mark.

Similarly, opposer describes its “Wave” radio as “an electronic audio product that includes a power amplifier.” It is, essentially, a radio or radio with CD player, both for home use, that sells for approximately $300-$500. The mark WAVE has been in use in connection therewith since 1993. Mr. Kingsbury testified that opposer’s annual sales of its Wave radio products are more than $100 million, with total sales since 1993 of more than $250 million; and that opposer’s annual advertising expenses for its Wave radio products are more than $30 million, with advertising expenses since 1993 for this product totaling more than $60 million.

Applicant is a manufacturer of audio products, principally power amplifiers, exclusively for the professional audio market. Applicant has used its POWERWAVE mark since November 11, 1994 on its "Powerlight," "PLX," "CX," and "DCA" series of amplifiers and power amplifiers, which constitute 30% of applicant's total sales. Applicant uses the term "PowerWave Technology" in connection with the switching power supply technology in these series of amplifiers and power amplifiers. Applicant's witness, Mr. Kalmen, distinguished applicant's amplifiers for professional use from those for consumer use stating that applicant's amplifiers are too powerful to use with a consumer audio system, require different types of connectors, and have fans, which are considered too noisy for consumer systems.

The cost to the end user of a POWERWAVE amplifier or power amplifier is between $900 and $5,000. Applicant sells its products through sales representatives and contractors who are audio professionals. Because the information has been submitted as confidential, we will state only that applicant's sales of its POWERWAVE products, and its advertising in connection therewith, are significant. Mr. Dorwart, opposer's director of sales and marketing for professional products, testified that he is

familiar with applicant and its products and that applicant's reputation is as a manufacturer of good quality, moderately-priced power amplifiers.

Both parties agree, essentially, on the elements distinguishing the consumer audio market from the professional audio market. The consumer audio market consists principally of compact audio systems and audio components sold to consumers for home or office use.

The professional audio market mainly provides audio systems for stadiums, arenas, movie theaters, and other large spaces. Opposer's witness opined that the professional market may include, or could include, systems or components sold to recording artists, DJ's, professional musicians, and other music afficionados.

The evidence indicates that a professional audio dealer or contractor will usually design a complete audio system to permanently install in a new space under construction or to retrofit an existing space. The purchasing decision is made, usually after substantial consultation, by the architect or engineer responsible for that aspect of the project, or by the person within an organization responsible for such a purchase.

Advertising in this market is aimed at audio professionals through direct contact, trade shows and trade

journals. Mr. Dorwart testified that opposer advertises the concept of a custom sound solution, rather than advertising individual components. Mr. Dorwart testified that the design and installation of a custom professional audio system by opposer averages from one year to eighteen months, but can take as little as four months or as long as four years. Mr. Dorwart testified that, for opposer, the cost of the design portion ranges from $3,000 - $5,000 for smaller venues, such as stores and restaurants, to $30,000 - $40,000 for large venues, such as stadiums and arenas. The cost of the equipment and installation ranges from $8,000 - $20,000 for small venues to $30,000 - $2 million for large venues. Mr. Dorwart stated that, for North America, opposer averages more than 1,000 contracts per year for smaller venues and approximately fifteen to twenty contracts per year for large venues.

Analysis

Inasmuch as certified copies of opposer's registrations are of record, there is no issue with respect to opposer's priority. *King Candy Co., Inc. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination of likelihood of confusion under Section 2(d) must be based on an analysis of all of the

probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. *In re E.I. du Pont de Nemours & Co.,* 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). Key considerations in this case are whether and to what extent opposer's marks are famous; and the similarities and dissimilarities between the marks, the goods, the channels of trade, and the class of purchasers.[10] *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976); and *In re Azteca Restaurant Enterprises, Inc.,* 50 USPQ2d 1209 (TTAB 1999) and the cases cited therein.

First, we consider opposer's contention that its pleaded marks are famous and entitled to a broad scope of protection. Applicant concedes that opposer's house mark, BOSE, is famous, but argues that opposer's WAVE and ACOUSTIC WAVE marks are not famous. Opposer has introduced no direct evidence of the alleged fame of these marks among relevant consumers.[11] Opposer's only evidence in support of its contention is sales and advertising figures in connection with its WAVE and ACOUSTIC WAVE products.

[10] Although applicant argues that lack of actual confusion is a significant factor, we find little evidence in the record regarding the opportunities for confusion to occur. Thus, we find this factor of little persuasive value.

[11] This statement is not meant to imply that direct evidence, such as surveys, is required in order to determine whether a mark is famous.

Opposer's evidence indicates that it uses its BOSE mark in connection with its various trademarks on its products. The evidence includes a fair number of individual ads wherein the mark BOSE also appears. Absent additional evidence regarding the nature and extent of promotion or consumer perception of the marks WAVE and ACOUSTIC WAVE apart from the admittedly famous BOSE mark, we cannot conclude that this evidence establishes the fame of these pleaded marks. Nor is there evidence placing the sales and advertising figures in any content from which to determine how substantial the figures are for these types of products. We conclude that opposer has not established that its WAVE and ACOUSTIC WAVE marks are famous.

We consider, next, the goods of the parties. Applicant's identified goods are amplifiers and power amplifiers – products that are components of an audio or video system. On the other hand, opposer's identified goods are complete audio systems of one type or another, rather than individual components of such systems. Opposer's WAVE mark is used and registered in connection with various small audio electronics, ranging from radios to compact stereo systems; and opposer's ACOUSTIC WAVE mark is used and registered in connection with loudspeaker

systems[12] and with a music system that *includes* an amplifier. Opposer's goods are not, however, amplifiers.[13]

Clearly, the parties' goods are not the same. The question is, rather, to what extent, if any, are the goods related or of such a nature that, if identified by confusingly similar marks, relevant consumers would believe the parties' goods come from the same source. The mere fact that both parties' goods may be considered part of the general category of audio electronic products is insufficient to warrant the conclusion that the goods are so related.

Opposer argues, essentially, that since at least one of its identified goods contains an amplifier and applicant's goods consist of amplifiers, the parties' goods are related. However, even with respect to opposer's ACOUSTIC WAVE Music System, the only product that is stated to contain an amplifier, there is no indication that consumers would be aware of the individual components within the system. Nor is there evidence regarding whether consumers would believe that loudspeaker systems or other

[12] It is unclear whether opposer's "loudspeaker systems" are complete audio systems or components as there is very little evidence in the record about these goods.

[13] While opposer's evidence indicates that opposer may sell amplifiers as a separate audio component, it is clear that such goods are not identified by either the WAVE or ACOUSTIC WAVE trademark.

audio systems would originate from, or be sponsored by, the same sources as audio components, such as amplifiers, if identified by confusingly similar marks.

Thus, we conclude that the evidence is insufficient to establish whether, or to what extent, any relationship exists between the parties' goods. Opposer has not established a sufficient relationship between its goods and applicant's identified goods to warrant the conclusion that, if registered in connection with confusingly similar marks, there would be a likelihood of confusion as to source or sponsorship.

We note that, regarding channels of trade, applicant has argued that applicant presently sells it goods entirely to the professional audio market; that products in this market are very expensive, and are bought by knowledgeable and sophisticated purchasers after careful consideration; and that opposer's products identified by the WAVE and ACOUSTIC WAVE marks are sold entirely to the consumer audio market. However, applicant's argument is not well taken. We must determine the issue of likelihood of confusion based on the goods identified in the application. Both opposer's and applicant's identifications of goods are broadly worded, without any limitations as to channels of trade or classes of purchasers. We must presume that the

goods of applicant and opposer are sold in all of the normal channels of trade to all of the usual purchasers for goods and services of the type identified. *See Canadian Imperial Bank v. Wells Fargo*, 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). In other words, because the evidence establishes that amplifiers are audio components that are sold in the professional audio market as well as in the consumer audio market, albeit different models with different specifications, we must conclude that applicant's goods encompass amplifiers and power amplifiers for both the consumer and professional audio markets.

Turning to the marks, there is no question that, as opposer argues, applicant's mark, POWERWAVE, encompasses opposer's WAVE mark in its entirety and shares the WAVE portion of opposer's ACOUSTIC WAVE mark. However, our inquiry does not end here.

Applicant contends that the marks are not confusingly similar because their only common component is the allegedly highly suggestive term "wave." In this regard, it is clear from the testimony of Mr. Kalmen, Mr. Kingsbury and Mr. Dorwart that the term "acoustic wave" indicates a "sound wave." We take judicial notice of the definitions of "acoustic" as "of or relating to sound or sound waves" and of "wave" as "a rolling or undulating movement or one

of a series of such movements passing along a surface or through the air" and as "a radio wave."[14]

Applicant submitted, under notice of reliance, classified pages excerpts from various telephone books that list, under "electronics" and "communications" headings, company names that include the term "wave."[15] Although this is only minimal evidence of the use of these company names, and is not indicative of the extent of use, it is evidence that consumers are likely to be familiar with the appearance of the term "wave" in connection with communications companies and electronics companies.

While we must base our consideration of the marks on a comparison of the marks in their entireties, we are guided, equally, by the well established principle that, in articulating reasons for reaching a conclusion on the issue of confusion, "there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their

[14] *Webster's Third New International Dictionary*, unabridged (1993).

[15] We have previously discounted the value of the trademark search reports submitted in connection with Mr. Kalmen's testimony. Applicant's notice of reliance also includes excerpts from a Dunn and Bradstreet Electronic Business Directory. Such evidence is not adequate to show use of any mark listed therein. Tiffany & Co. v. Classic Motor Carriages Inc., 10 USPQ2d 1835, 1839 at n. 5 (TTAB 1989).

entireties." *In re National Data Corp.,* 732 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

Opposer's mark WAVE for the identified goods can be considered a double entendre suggesting both sound waves and radio waves. Opposer's mark ACOUSTIC WAVE, as it is used to identify opposer's "Acoustic Wave Music System" and in connection with the goods identified in the pleaded registration, is suggestive of sound waves. Opposer does not argue otherwise. In fact, in view of opposer's advertising that touts its research in the field of acoustics and its unique "wave technology," we find opposer's marks to be highly suggestive in connection with the respectively identified goods.

In view thereof, we find that the term POWER in applicant's mark, POWERWAVE, while also suggestive of applicant's goods, leads to a different connotation, as well as a different appearance, than either of opposer's marks. This difference is sufficient to create a distinctly different commercial impression than either of opposer's marks, when the parties' marks are considered in their entireties in connection with the respective goods.

In conclusion, opposer has not met its burden of proof in showing that confusion is likely. In considering the relevant factors determinative of likelihood of confusion,

the differences between the parties marks and their respective goods are sufficient to avoid a likelihood of confusion. Based on the record before us, we see the likelihood of confusion claim asserted by opposer as amounting to only a speculative, theoretical possibility.

Decision: The opposition is dismissed.

E. W. Hanak

T. J. Quinn

C. E. Walters
Administrative Trademark Judges,
Trademark Trial and Appeal Board